**IN THE**

**SUPERIOR COURT OF FULTON COUNTY**

**File No. B-74692**

MARTIN COHN,

*Plaintiff,*

*vs.*

COX BROADCASTING CORPORATION and THOMAS WASSELL,

*Defendants.*

## ORDER ON MOTIONS FOR SUMMARY JUDGMENT FILED BY SAID PLAINTIFF AND SAID DEFENDANTS

[By Judge Durwood Pye, Fulton Superior Court]

— A —

Paragraph Three of plaintiff's Complaint alleges in part: On April 10, 1972 and on April 11, 1972 the defendants . . . . caused to be televised and did televise in two newscasts the name of Cindy Cohn, also known as Cynthia Leslie Cohn the victim of a rape and attempted rape, and the daughter of the plaintiff herein, contrary to Ga. Code Ann. § 26-9901 (Acts 1968, pp. 1249, 1335) thereby disseminating to the public the identity of a female who was raped and upon whom an assault with intent to commit rape was made.

In answer to said paragraph three defendants say in part (paragraph three of second defense): Answering the allegations of paragraph three of plaintiff's Complaint, defendants' admit that they caused to be televised a newscast at approximately 6 p.m. on April 10, 1972 and at approximately 12:15 a.m. on April 11, 1972, wherein the name of the said Cynthia (Cindy) Leslie Cohn was mentioned once and defendants' further admit that the said Cynthia (Cindy) Leslie Cohn was the daughter of plaintiff and was the purported victim of a rape and attempted rape . . . .

In an affidavit of plaintiff he deposes in part: I am the father of Cynthia Leslie Cohn, 17 who died on August 18, 1971.

The Court is unable to find any denial of this sworn statement among the papers submitted.

This is the only portion of the affidavits submitted by or on behalf of plaintiff which the court considers upon said motions for summary judgment; and therefore makes no ruling in respect of questions presented by pleadings attacking affidavits submitted on behalf of plaintiff.

The court has considered all pleadings and briefs of all parties, and all evidentiary material submitted by defendants.

—B—

A portion of said Act of 1968 is set forth in Sec. 26-9901 of Ga. Code, Ann., in part as follows:

It shall be unlawful for any news media or any other person to print and publish, broadcast, televise, or disseminate through any other medium of public dissemination or cause to be printed and published, broadcast, televised, or disseminated in any newspaper, magazine, periodical or other publication published in this State or through any radio or television broadcast originating in the State the name or identity of any female who may have been raped or upon whom an assault with intent to commit rape may have been made.

Section 1 of the Act approved August 21, 1911 (Ga. Laws 1911, page 179-180), provides:

Sec. 1. Be It Enacted by the General Assembly of the State of Georgia, and it is hereby enacted by the authority of the same, that from and after the passage of this Act it shall be unlawful for any newspaper publisher, or any other person to print and publish, or cause to be printed and published in any newspaper, magazine, periodical or any other publication published in the State of Georgia the name or identity of any female who may have been raped, or upon whom an assault with intent to commit rape may have been made.

Assuming the statute above referred to from the Code Ann. and the Act of 1968 to be purely a penal statute, it is clear that said Sec. 1 of the 1911 Act states a rule of civil conduct, which was not repealed by the New Penal Code set forth in the 1968 Act (Ga. Laws 1968 beg. at p. 1249) Cf. 142 Ga. 802.

As the publications complained of come within

Sec. 1 of the Act of 1911, as the same states a rule of civil conduct, and as the plaintiff is not shut into the Act of 1968 alone, it is unnecessary for the court to make any *definite determination* as to whether the Act of 1968 *in fact and law* is merely penal and does not state a rule of civil conduct, and for the purposes hereof will refer to *both* Sec. 1 of the 1911 Act and said portion of the 1968 Act as "said law."

Defendant attacks the 1968 statute as unconstitutional, and the court will rule thereon, and likewise finds it just to treat said attacks as also directed to Sec. 1 of the 1911 Act as the same states a rule of civil conduct; rulings as to constitutional matters relate to both Acts.

In the opinion of the court said law is not unconstitutional as a rule of civil conduct for any reason set forth in the pleadings in this case.

In the opinion of the court said law is to be construed with the laws of privilege as to Court proceedings, and in pari materia, and said laws as to privilege are thereby modified to the limited extent stated.

Said law is restrictive of speech and press, but not unreasonably so, and here the privileges and liberties in this report, must yield to the public good and individual liberties.

Said law is in part declaratory of the natural and fundamental rights of privacy existing under the common law of this State and the Constitution thereof, and in part in implementation thereof, and in part a statutory extension of such rights; it operates not

only in favor of the name, identity, reputation and repute of the woman wronged, but in favor of her family, and especially as to an infant in favor of her father to whom her name and fame are committed in trust to his paternal care, and whose reputation, name and fame are a part of his own, when said law is violated as to such daughter, it is violated as to him; an action by the father upon said law is in no true sense an action of relational right, but any action for injury done the father, as positive and direct as the lightning bolt, and as the protection of said law is not abated by the death of the woman, and the father's injury no less that his daughter shall have died, the death of the infant is neither justification or excuse.

Being of opinion as aforesaid, it is considered ordered and adjudged by the court as follows, to-wit:

(a) That the motion of defendants for summary judgment be and the same is hereby overruled and denied;

(b) That the motion of plaintiff for summary judgment be and the same is hereby granted and ordered only as to liability;

(c) That plaintiff is entitled to recover of both defendants in some amount, the amount to be determined by the jury;

(d) No ruling is made as to whether the pleadings and evidence of defendants do or do not present matters in mitigation.

This 12 December 1972.

*Durwood Pye, Judge Superior Court*

Filed in Office December 13, 1972.

*Bo Langly, Deputy Clerk, Superior Court of Fulton County.*

*Martin Cohn*
*Cox Broadcasting Corporation*
B-74692

## CERTIFICATE OF SERVICE

I hereby certify that I have this day served Kirk McAlpin of the firm of King and Spalding, attorney for the Defendants, and Stephen Land of the firm of Zachary and Land, attorney for the Plaintiff, in the above styled case with exact copies of the foregoing "Order on Motion for Summary Judgment filed by said Plaintiff and said Defendants" signed December 12, 1972 by Judge Durwood T. Pye and filed on December 13, 1972, by placing same in properly addressed envelopes in the United States Mail with adequate postage thereon.

This the 13th day of December, 1972.

*Bo Langly, Deputy Clerk, Superior Court of Fulton County, Atlanta Judicial Circuit.*

**IN THE**

**SUPERIOR COURT OF FULTON COUNTY**

**STATE OF GEORGIA**

**File No. B-74692**

MARTIN COHN,
*Plaintiff,*

*vs.*

COX BROADCASTING CORPORATION and
THOMAS WASSELL,
*Defendants.*

**ORDER UPON HEARING OF DEFENDANTS' MOTION TO RECONSIDER FILED DECEMBER 22, 1972**

Upon consideration of said motion on the briefs of counsel, and the oral arguments of counsel, the Court has undertaken to review its previous order and to consider all points made in the motion; and is constrained to adhere to its previous order and ruling and it is so ordered by the Court.

Upon presentation of a certificate of immediate review, if such is desired, immediate review will be ordered.

This 29 December, 1972.

Durwood Pye, Judge
Superior Court

IN THE

SUPREME COURT OF GEORGIA

27880.

COX BROADCASTING CORPORATION, et al. v COHN (612)

GUNTER, Justice. This appeal involves the alleged invasion of "the right to be left alone". The cause of action involved is also referred to as an invasion of the right of privacy, or the tort of public disclosure.

On August 18, 1971, the Appellee's seventeen year old daughter was the victim of the crime of rape. Her death immediately followed. Six young men were subsequently indicted for murder and rape.

The rape and death of the rape-victim were widely publicized immediately after the occurrence of these events. However, apparently because of a Georgia statute (Code § 26-9901) the identity of the female victim was not disclosed by any of the news media. That Georgia statute is as follows:

> "It shall be unlawful for any news media or any other person to print and publish, broadcast, televise or disseminate through any other medium of public dissemination or cause to be printed and published, broadcast, televised or disseminated in any newspaper, magazine, periodical or other publication published in this State or through any radio or television broadcast originating in the State

the name or identity of any female who may have been raped or upon whom an assault with intent to commit rape may have been made. Any person or corporation violating the provisions of this section shall, upon conviction, be punished as for a misdemeanor."

Approximately eight months after the commission of the alleged crimes, the six young men were involved in court proceedings pursuant to the indictments returned against them. On the same day of the court proceedings, April 10, 1972, and on the following day, April 11, 1972, the Appellant broadcasting company and its agent-reporter originated a telecast from the courthouse which disclosed the identity of the deceased rape-victim.

That telecast in part contained the following:

"Six youths went on trial today for the murder-rape of a teenaged girl.

"The six Sandy Springs high school boys were charged with murder and rape in the death of seventeen year old Cynthia Cohn following a drinking party last August 18.

"The tragic death of the high school girl shocked the entire Sandy Springs community. Today the six boys had their day in court.

"There was no jury. The six boys through their lawyers, threw themselves on the mercy of the court . . . and the presiding judge, Sam Phillips McKenzie.

"The prosecutor, assistant Attorney General John Nuckolls said the girl had apparently drank [sic] a considerable amount of vodka attending a private party. He said the girl was taken to a wooded area and raped. She passed out . . . and the liquids in her stomach were forced upward causing suffocation. The exact cause of death . . . that is whether the rape caused death he said would be difficult to prove.

"Judge McKenzie dropped the murder charge against all six . . . and proceeded with the charge of rape. The DA told the judge all six defendants wished to plead guilty . . . and not have a jury trial. The DA told the court the girl's family felt that a lenient five year sentence would serve justice and he recommended a five year sentence."

The rest of the telecast, too lengthy to quote here, dealt with the names of the young men and the sentences that they received.

On May 8, 1972, the Appellee brought an action for money damages against the broadcasting company and its reporter for having invaded his right to privacy by publishing the identity of his deceased daughter in connection with the circumstances related to the telecast.

There being no material dispute about the facts, both sides filed motions for summary judgment in the trial court. The Appellants' motion for summary judgment was denied, and the Appellee's motion for summary judgment was granted as to liability on the part of Appellants, leaving for future determination

in the trial court the amount of damages recoverable by the Appellee. The trial court granted a certificate for immediate review, and we must now decide whether the trial court's partial summary judgment establishing liability on the part of the Appellants was correct.

We must reverse the judgment below and remand the case for further proceedings consistent with this opinion.

I.

The trial court apparently granted summary judgment as to liability against the Appellants on the theory that the Georgia statute which prohibits disclosure of the identity of a rape victim gives rise to a civil cause of action in favor of the victim and, in this case, the father of a deceased victim against the party making the disclosure; and there being no question about the disclosure in this case, the trial court determined liability to exist against the disclosing parties as a matter of law.

We disagree with the trial court on this score. This Georgia statute and its predecessor, formerly codified as Code § 26-2105, are penal in nature, and while these statutes establish the public policy of this state on this subject, neither of them created a civil cause of action for damages in favor of the victim or anyone else.

Since we rule that the statute did not create a civil cause of action, it is unnecessary for us to con-

sider and rule on the various constitutional attacks made on the statute by the Appellants.

II.

Aside from the statute, did the Appellee's complaint filed in the trial court state a cause of action for invasion of the Appellee's right to be left alone, or for the invasion of the Appellee's right of privacy, or for the tort of public disclosure?

This tort, by whatever name it may be called, though relatively new in the entire history of the Common Law, has been recognized in this jurisdiction since 1905. This tort, though fathered by Messrs. Warren and Brandeis in a remarkable law review article published in 1890, was birthed by this Court, in *Pavesich v. New England Life Insurance Company*, 122 Ga. 190, 50 SE 68, (1905). See Dean Wade's article, *Defamation and the Right to Privacy*, 15 Vanderbilt Law Review 1093 (October, 1962).

Dean Prosser, in his law review article entitled *Privacy* in 48 California L. Rev. (August, 1960), said that *Pavesich* initially recognized the existence of a distinct right of privacy and thus became the leading case on the subject. He further said in that article:

> "Along in the thirties, with the benediction of the *Restatement of Torts*, the tide set in strongly in favor of recognition, and the rejecting decisions began to be overruled. At the present time the right of privacy, in one form or another, is declared to exist by the overwhelming majority of the American courts."

Mr. Justice Peters of the California Supreme Court in a relatively recent case, *Briscoe v. Reader's Digest Association*, 483 P. 2d 34, (1971), said:

> "A common law right to privacy, based on Warren and Brandeis' article, is now recognized in at least thirty-six states."

We therefore adhere to our *Pavesich* beginnings and reiterate that this common law tort exists in this jurisdiction without the help of the statute that the trial judge in this case relied on.

III.

Does the father of a deceased minor child have a cause of action in tort by virtue of the public disclosure of the identity of his daughter as the victim of a sex crime and the unpleasant circumstances connected therewith, all of which occurred approximately eight months prior to the public disclosure of his daughter's involvement?

It is clear that the female victim's privacy was not invaded in this case. She had been dead some eight months prior to her identity and involvement being publicly disclosed.

The surviving father of the deceased daughter asserts that the tort was perpetrated directly upon him. He contends that the public disclosure of the identity and involvement of his daughter eight months after the fact invaded his right to privacy and intruded upon his right to be left alone, free from and uncon-

nected with the sad and unpleasant event that had previously occurred.

A cause of action asserted by a close relative is sometimes called a "relational" right to privacy. Dean Green delved into the subject of relational interests in a law review article published in 1934. 29 Illinois L. Rev. 460. The beginning paragraph of that article is as follows:

> "The value of the relational interest in dealing with tort cases has not been generally recognized. It has been in large measure ignored or else classified as a property interest. It deserves a place alongside of personality and property. It fills an indispensable place in tort classification."

Later in the article at page 487, he said:

> "It is not a situation of hurting the plaintiff's personality or harming the plaintiff's property. It is, strictly speaking, a hurt to the relational interest of the plaintiff — his interest in a deceased relative — and on the basis of recovery is not only warranted on behalf of a plaintiff, but is further warranted on the basis of condemning or penalizing the inconsiderate conduct of the defendant where such tender relations are involved."

See also in this connection the Note by Robert P. Kennedy entitled "The Right to Privacy in the Name, Reputation and Personality of a Deceased Relative" in 40 Notre Dame Lawyer 324, (April, 1965).

This jurisdiction is not without precedent in the "relational" area of the law. In *Bazemore, et. al. v.*

*Savannah Hospital, et al.*, 171 Ga. 257, 155 SE 194 (1930), the parents of a deceased infant with an unusual birth defect sued a hospital, a photographer, and a newspaper for invasion of their privacy by publishing, or aiding the disclosure and publication of, a photograph depicting their deformed infant. The opinion by this Court said:

> "In this case the child was dead when the unauthorized acts were committed, and the right of action could not be in the child, but in the parents .... The petition in this case by the parents of a deceased child for general and special damages to the plaintiffs, and for injunction because of the alleged tortious act, set forth a cause of action."

The complaint in the case had sought money damages against all three of the defendants jointly and severally. This Court held that the complaint stated a cause of action against all three defendants.

The Appellants in the case at bar contend that *Bazemore* is not authority for the existence of the "relational" right in this state. They argue that the decision turned on a breach by the hospital of its contractual and ethical obligation to the parents of the infant and that the photographer and the newspaper had wilfully participated in such breach. We are not persuaded by this argument.

*Bazemore* said that the parents of the deceased infant had a cause of action against the newspaper because of its public disclosure which affected them, the parents. As we read *Bazemore*, how that public disclosure by the newspaper came about, whether by

breach of contractual and ethical obligations or otherwise, was immaterial. A newspaper made a public disclosure concerning a deformed, deceased infant of surviving parents. Such disclosure allegedly affected the surviving parents in an adverse manner. The surviving parents' complaint properly stated a cause of action against the newspaper.

In the case at bar we hold that the Appellee's compiaint properly stated a cause of action, whether it be denominated "relational" or not, against the Appellants.

IV.

Although the Appellee's complaint in this case stated a claim for relief, the public disclosure, admitted by the Appellants, did not establish liability on the part of the Appellants as a matter of law. Whether the public disclosure actually invaded the Appellee's "zone of privacy", and if so to what extent, are issues to be determined by the fact-finder. And in formulating such an issue for determination by the fact-finder, it is reasonable to require the Appellee to prove that the Appellants invaded his privacy with wilful or negligent disregard for the fact that reasonable men would find the invasion highly offensive.

V.

We now turn to the head-on collision between the tort of public disclosure and First Amendment rights of freedom of speech and press.

Georgia's Constitution says:

> "No law shall ever be passed to curtail, or restrain the liberty of speech, or of the press; any person may speak, write and publish his sentiments on all subjects, *being responsible for the abuse of that liberty*". Ga. Code § 2-115.

Georgia's Constitution also says:

> "Protection to person and property is the paramount duty of government, and shall be impartial and complete." Code § 2-102.

The protections to speech and press contained in the First Amendment to the Constitution of the United States are made applicable to the State of Georgia by the Fourteenth Amendment. However, despite the late Mr. Justice Black's absolutist position with regard to the First Amendment, we know that his position has never been adopted by the Supreme Court of the United States. There are a number of legitimate limitations on speech which are not proscribed by the First Amendment. These limitations are generally set forth by Professor Leflar in *The Free-ness of Free Speech*, 15 Vanderbilt L. Rev. 1073, (October, 1962). In that article the author discussed the freedom of speech requirement of the First Amendment, and he determined that this constitutional guarantee is not absolute. He further concluded that the court should weigh the conflicting societal values of the present day in reaching a decision as to whether the particular speech in issue is protected by the First Amendment. On page 1083 of that article Professor Leflar said:

"How then do we, or should we, make our specific judgment? How do we while effectuating our ideal, or perhaps only pretending to effectuate it, pick out the situations in which free speaking will be penalized?

"One mass of cases is easy. Neither frauds nor perjuries nor most defamations have within them any of the social values for which our ideal demands protection. The libel or slander which seeks acceptance of no cultural, political, social or ethical attitude, which urges upon the group no controversial idea or opinion, which seeks nothing beyond private benefit to the speaker or harm to others, does not come within the ideal at all. It deserves no constitutional protection, and receives none."

The Supreme Court of Wisconsin in *State v. Evjue*, 33 NW 2d 205, (1948), upheld the constitutionality of that state's statute prohibiting disclosure of the identity of a rape victim against all First Amendment attacks. Also, in *Nappier v. Jefferson Standard Life Insurance Company*, 322 Fed. 2d 502, (1963), the contention was made that the disclosure of a rape victim's identity was a matter of public concern and record so as to be exempted from South Carolina's non-disclosure statute and from the rule of privacy. The Fourth Circuit handled this argument as follows:

"The ready replication is that the statute states an exception to the exemption. No matter the news value, South Carolina has unequivocally declared the identity of the injured person shall not be made known in press or broadcast . . . . No constitutional

infringement has been suggested. Indeed, Standard conceded in oral argument that if the broadcast did in fact and in law 'name' the plaintiffs, then they had a right of action."

A Note in Yale Law Journal (June, 1973) makes a rather convincing argument that there is a First Amendment interest in protecting the privacy of the individual which is on a par with the First Amendment interest which permits disclosure of the identity of a person whose privacy will be invaded by such disclosure. The contention is there made that there must be a balancing by the courts of these two constitutional interests.

In *Briscoe, supra*, the Supreme Court of California held that a plaintiff, convicted of a crime eleven years earlier, had a claim for invasion of privacy by virtue of the disclosure of his identity eleven years after the fact.

That Court said:

"But men are not so divine as to forgive the past trespasses of others, and plaintiff therefore endeavored to reveal as little as possible of his past life. Yet, as if in some bizarre canyon of echoes, petitioner's past life pursues him through the pages of the *Reader's Digest*, now published in thirteen languages and distributed in one hundred nations, with a circulation in California alone of almost two million copies."

The Court in *Briscoe* then went on to say:

> "But the rights guaranteed by the First Amendment do not require total abrogation of the right to privacy. The goal sought by each may be achieved with a minimum of intrusion upon the other."

We agree. First Amendment proscriptions do not bar the claim of the Appellee against the Appellants in this case.

## VI.

To conclude: The trial court correctly denied the motion of Appellants for summary judgment; the trial court erroneously granted the Appellee's motion for partial summary judgment; and the case is remanded to the trial court for further proceedings consistent with this opinion.

*Judgment affirmed in part, reversed in part, and remanded with direction. All the Justices concur except Grice, P. J., Undercofler, J. and Jordan, J. J. who dissent.*

27880.

## COX BROADCASTING CO. v. COHN.

UNDERCOFLER, Justice, dissenting. The majority opinion ignores the established rule in Georgia that "where an incident is a matter of public interest, or the subject of a public investigation, a publication in connection therewith can be a violation of no one's legal right of privacy." *Waters v. Fleetwood*, 212 Ga. 161, 167 (91 SE2d 344, 348). This qualification on the public disclosure tort comports with the overwhelming majority of cases that have considered the public interest aspect of a publication. See Prosser, *Law of Torts* 823-33 (4th ed. 1971); 18 ALR3rd 875, 882-84. Indeed, the American Law Institute has recognized and approved this qualification, and has taken the position that persons who reluctantly become subjects of public interest by virtue of some "striking catastrophe" are nevertheless "subject to the privileges which publishers have to satisfy the curiosity of the public as to their leaders, heroes, villains and victims." *Restatement of Torts* § 867, comment c (1939).

The public interest qualification is grounded in the rights of freedom of press and speech granted in both the Georgia Constitution and the First Amendment to the Federal Constitution. In reference to these fundamental freedoms this Court said in *Pavesich v. New England Life Ins. Co.*, 122 Ga. 190, 204 (50 SE 68, 74), that "[t]he truth may be spoken, written, or printed about all matters of a public nature, as well as matters of a private nature in which the public has a legitimate interest." The constitutional freedoms of press and speech are so jealously guarded

that even publication of *false* reports of matters of public interest are privileged absent a showing that the defendant "published the report with knowledge of its falsity or in reckless disregard of the truth." *Time, Inc. v. Hill*, 385 U.S. 374, 388. Certainly the publication of true information regarding a matter of public interest can be no less privileged. The constitutional privilege is controlling regardless of whether recovery would be predicated on violation of statute, or on some theory akin to negligence *per se* with the statute providing the duty or standard of care owed the plaintiff, or, as the majority would have it, on the basis "that reasonable men would find the invasion highly offensive."

*I am authorized to state that Presiding Justice Grice and Justice Jordan concur in this dissent.*

**IN THE**

**SUPREME COURT OF GEORGIA**

27880. COX BROADCASTING CORPORATION, ET AL. v. COHN (612)

**ON MOTION FOR REHEARING**

GUNTER, Justice. The Appellants have filed a motion for rehearing in which they contend that their motion for summary judgment in the trial court should have been granted because the public disclosure or publication in this case was a matter of public interest or general concern.

This argument overlooks the fact that the 1968 statute (Code § 26-9901) enacted by the Georgia Legislature declared that the identity of a female victim of the crime of rape shall not be disclosed by the news media. In the original opinion we held that this statute established the public policy of Georgia on this subject. This statute does not prevent disclosure or publication of "the event"; it merely prohibits the disclosure or publication of the identity of the victim of the event.

Implicit, though not explicit, in the Appellants' argument is that this Court should declare this 1968 statute unconstitutional as violative of the First Amendment.

A majority of this Court does not consider this statute to be in conflict with the First Amendment. We think the General Assembly of Georgia had a

perfect right to declare that the victim of such a crime should not be publicly identified by the news media. The First Amendment is not absolute; and we consider this statute to be a legitimate limitation on the right of freedom of expression contained in the First Amendment.

There simply is no public interest or general concern about the identity of the victim of such a crime as will make the right to disclose the identity of the victim rise to the level of First Amendment protection.

No case has been cited to us, and we have found none, declaring such a statute to be unconstitutional. To the contrary, the Supreme Court of Wisconsin in *Evjue*, cited in the original opinion, said:

> "It is considered that there is a minimum of social value in the publication of the identity of a female in connection with such an outrage. Certain it is that the legislature could so find. At most the publication of the identity of the female ministers to a morbid desire to connect the details of one of the most detestable crimes known to the law with the identity of the victim. When the situation of the victim of the assault and the handicap prosecuting officers labor under in such cases is weighed against the benefit of publishing the identity of the victim in connection with the details of the crime, there can be no doubt that the slight restriction of the freedom of the press prescribed by section 348.412 is fully justified.
>
> We find no ground upon which section 348.412 may be held invalid."

We hold that this 1968 Georgia statute is not unconstitutional, and because of this statute the disclosure of the identity of the victim of such a crime is not a matter of public interest and general concern in this state.

The motion for rehearing is denied.